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No. 112

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IN THE

Supreme Court of the United States

October Term, 1958.

No. 43,014

BROWN-FORMAN DISTILLERS CORPORATION,

Appellant,

versus

COLLECTOR OF REVENUE,

Respondent.

On Appeal from the Supreme Court of the State of Louisiana.

JURISDICTIONAL STATEMENT.

HARRY McCALL,
1500 National Bank of Commerce Bldg.,
New Orleans 12, Louisiana,
Attorney for Appellant.

Of Counsel:
CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

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IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1958.

No. 43,014.

BROWN-FORMAN DISTILLERS CORPORATION,
Appellant,

versus

COLLECTOR OF REVENUE,
Respondent.

On Appeal from the Supreme Court of the State of Louisiana.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the State of Louisiana entered in this action on March 17, 1958, while refused rehearing of its opinion entered on February 10, 1958, affirming the judgment of the 19th Judicial District Court in and for the Parish of East Baton Rouge, State of Louisiana, and submits this statement in support of its contention that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is presented.

OPINION BELOW.

The opinion of the State Supreme Court in this action has not been officially reported. It is unofficially reported in 101 So. 2d 70. A copy of the opinion of that Court is attached hereto as Appendix A. A copy of the District Court's (trial court's) judgment, dated April 23, 1956, is attached hereto as Appendix B. This opinion has not been reported and opinions of the District Court are not usually reported.

JURISDICTION.

Appellant, Brown-Forman Distillers Corporation, filed its petition in the 19th Judicial District Court in and for the Parish of East Baton Rouge for the recovery of a sum equal to State income taxes and interest paid by appellant pursuant to the demand of the Collector of Revenue of the State of Louisiana, the gravamen of which petition was that the statute under which the Collector demanded the income tax from appellant did not apply to appellant and, if it did apply, it contravened the Constitution of the United States. The judgment from which this appeal is taken is the judgment entered on February 10, 1958, by the Supreme Court of the State of Louisiana. Petition for rehearing of the decision of the Supreme Court of the State of Louisiana was timely filed on February 24, 1958, and refused on March 17, 1958. On this last date the judgment became final.

The jurisdiction of the Supreme Court of the United States to review the decision of the State Supreme Court

by direct appeal is conferred by 28 U.S.C. 1257(2) and 2101(c) and is sustained by the following cases: *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157, 74 S. Ct. 396 (1954); *Railway Express Agency, Inc. v. Commonwealth of Virginia*, 347 U.S. 359, 74 S. Ct. 558 (1954); *Freeman v. Hewit*, 329 U.S. 249, 67 S. Ct. 274 (1946); *Charleston Federal Savings and Loan Ass'n. v. Alderson*, 324 U.S. 182, 65 S. Ct. 624 (1945).

STATUTE INVOLVED.

The pertinent sections of the statute here involved are La. R.S. 47:31(4); 241, 244, 245, 246 and 1576, set forth in Appendix C.

QUESTIONS PRESENTED.

A. Are La. R.S. 47:31(4) and La. R.S. 47:241, under which Louisiana seeks to impose an income tax on appellant, in conflict with and thus invalid and void under the Due Process Clause of Amendment XIV to the Constitution of the United States in a case in which the appellant is a foreign corporation and its only contact with the State of Louisiana is the maintenance of "missionary men" within the State whose activities are to accompany the salesmen of appellant's wholesale purchasers on occasions to assist in obtaining a good display of appellant's products by the retail customers of such wholesalers; and in which all orders from such wholesalers are considered in appellant's home state and there rejected or accepted?

B. Are said sections, as construed by the Supreme Court of the State of Louisiana, invalid and void under Article I, Section 8, Clause 3 of the Constitution of the United States insofar as, thus construed, they impose a tax upon the net income of appellant, a foreign corporation, the only activity of which is the maintenance of such "missionary men" and their activities are an integral part of appellant's interstate activities; and where all revenues received by it from wholesalers in Louisiana resulted from its operations in interstate commerce?

STATEMENT OF CASE.

Brown-Forman Distillers Corporation is a Kentucky corporation engaged in the distillation and packaging of whiskies at Louisville and the distribution thereof among several States of the United States. Wholesale customers of appellant submit orders to representatives ("missionary men") of appellant in Louisiana; the orders are transmitted to Louisville where they are considered; if approved merchandise is shipped to Louisiana wholesalers who remit therefor directly to appellant in Louisville.

Appellant does not maintain in Louisiana any warehouse or stock of goods; its activities are limited to the presence of only missionary men who call upon its customers and who, on occasion, accompany the salesmen of its customers and assist in obtaining a good display of the product in the retail outlets of such wholesale customers. The missionary men do not solicit nor accept orders from such retail outlets.

The Louisiana Collector of Revenue demanded income tax from Appellant for the fiscal years ended April 30, 1951, 1952, and 1953, respectively; Appellant paid $6,-975.29 in such income taxes and interest being the amount which would be due if the activities in Louisiana subjected it to Louisiana Income Tax and filed timely a petition for the recovery thereof under La. R.S. 47:1576, in which suit it alleged the foregoing and also that Appellant is engaged solely in interstate commerce and does not do and has not done business in Louisiana of such character as to subject it to income taxes to the State of Louisiana; and that the levying of said income tax upon Appellant is contrary to the Constitution of the United States.

To this petition and a supplemental petition timely filed for the recovery of an additional sum of $11,754.76 paid pursuant to a similar demand of the Collector of Revenue, the Collector filed exceptions of no cause or right of action (demurrer) which were maintained by judgment of the 19th Judicial District Court in and for the Parish of East Baton Rouge on April 23, 1956. On May 11, 1956, pursuant to Appellant's motion, the District Court allowed a devolutive and suspensive appeal to the Supreme Court of Louisiana. The record was filed in the Supreme Court, pursuant to said order, on May 28, 1956. On February 10, 1958, the Supreme Court issued its opinion affirming the judgment of the District Court. Timely, on February 24, 1958, Appellant filed its petition for rehearing and on March 17, 1958, said petition was denied, which denial made final the judgment of the District Court.

HOW THE FEDERAL QUESTION IS PRESENTED.

The federal questions involved were first raised in Appellant's original petition in the District Court in its allegations:

"4.

"Petitioner is engaged solely in interstate commerce and does not do and has not done business in Louisiana of such character as to subject it to the payment of income tax to the State of Louisiana."

and

"7.

"The levying of said income tax upon petitioner, in view of petitioner's activities, is contrary to the Constitution of the United States of America, and particularly the commerce clause thereof."

The federal questions were raised in, considered and ruled upon by, the Supreme Court of Louisiana:

"The opinion in the Hay case fully answers appellant's argument that the levy of a tax by Louisiana on the net income derived by it from sources within this State unduly burdens interstate commerce and is, therefore, unconstitutional. That decision is founded upon pronouncements of the Supreme Court of the United States, particularly United States Glue Co. v. Town of Oak Creek, 247 U.S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748; Interstate Busses Corp. v. Blodgett, 276 U.S. 245, 48 S. Ct. 230, 72 L. Ed. 551; Memphis

Natural Gas Co. v. Beeler, 315 U.S. 649, 656, 62 S. Ct. 857, 86 L. Ed. 1090, 1096, and West Publishing Co. v. McColgan, 328 U.S. 823, 66 S. Ct. 1387, 90 L. Ed. 1603, affirming by per curiam the holding of the Supreme Court of California that a foreign corporation, doing business exclusively in interstate commerce, was amenable to state taxes on net income attributable to sources within the State, wherein that court (see West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861, 863) aptly observed:

> " 'It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause.'
>
> "In its brief, appellant does not directly assail the ruling in the Hay case but seeks to distinguish it from the instant matter on the ground that, there, the taxpayer performed extensive services in Louisiana, maintaining an office and staff of employers in this State and using waterways for the operation of its craft. (p. 14.)
>
> * * * * * * * *
>
> "Although appellant has not specially pleaded that the imposition of an income tax upon it violates due process, we nonetheless give consideration to this claim in view of the general charge that the levy is forbidden by the United States Constitution.
>
> "Suffice it to say that the claim of violation of the Fourteenth Amendment has no merit. See International Shoe Co. v. State of Washington, 326

U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, 161 A.L.R. 1057 and West Publishing Co. v. McColgan, supra." (p. 16.)

THE QUESTIONS ARE SUBSTANTIAL.

A. Due Process Question.

The Supreme Court of Louisiana sustained the State power to tax against Appellant's claim of lack of due process on the basis that its "missionary men" who take orders from wholesale dealers are really salesmen and thus there is a sufficiently significant local incident apart from its interstate activities sufficient to bring Appellant within the taxing power of the State.

Here, the representatives of Appellant did not solicit orders. Orders are submitted to them and they act as missionary men solely to obtain prominent display of Appellant's products in the premises of customers of Appellant's wholesale purchasers.

In *Memphis Steam Laundry Cleaner v. Stone*, 342 U.S. 389, 72 S. Ct. 424 (1952), the Court said:

> " * * * a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself. Whether or not solicitation of interstate business may be regarded as a local incident of interstate commerce, the Court has not permitted state taxation to carve out this incident from the integral economic process of interstate commerce."

In *Miller Co. v. State of Maryland*, 347 U.S. 340, 74 S. Ct. 535 (1954), the Court said (p. 344):

> "Our decisions are not always clear as to the grounds on which a tax is supported, * * * But

the course of decisions does reflect at least consistent adherence to one time-honored concept; that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."

This Court has noted probable jurisdiction in *Northwestern States Portland Cement Company v. Minnesota*, (No. 606 October Term, 1957). There the Due Process question is put: is solicitation of orders alone sufficient to subject a foreign corporation to state income tax and satisfy the requirements of Due Process? Here there is no active and regular solicitation of orders; the missionary men accomplish little, if anything, more than would be accomplished by advertising media such as the national circulation of magazines, radio and TV commercials and ads in the local press arranged through advertising agents having no connection with Louisiana.

B. Commerce Clause Question.

Under Article I, Section 8, Clause 3, of the Constitution the Congress has power "to regulate commerce * * * among the several States."

The interpretation by the Supreme Court of La. R.S. 47:241 determining that Appellant has sources of net income within the State upon the set of facts before it authorizes the levy of an income tax upon Appellant's activities wholly and exclusively in interstate commerce.

It is only in situations in which this Court has found the activity of the taxpayer to be local in nature, and not an integral part of interstate commerce that it has

sanctioned the tax. *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, 58 S. Ct. 546 (1938); *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80, 68 S. Ct. 1475 (1948).

The instant situation is even stronger for Appellant than was the situation presented in *Alpha Portland Cement Co. v. Massachusetts*, 268 U.S. 203, 45 S. Ct. 477 (1925). There this Court held the corporate excise and income tax invalid, being repugnant to the Commerce Clause. It would appear that the tax was invalid to an even greater degree in *Alpha* when considered in the light of Due Process than of Interstate Commerce.

CONCLUSION.

For the foregoing reasons, the questions presented by this appeal are substantial and are of importance to Appellant, to the general public and to those engaged in interstate commerce. It is respectfully submitted that probable jurisdiction should be noted.

Respectfully submitted,

HARRY McCALL,
1500 National Bank of Commerce Bldg.,
New Orleans 12, Louisiana,
Attorney for Appellant.

Of Counsel:
CHAFFE, McCALL, PHILLIPS, BURKE & HOPKINS,
1500 National Bank of Commerce Building,
New Orleans 12, Louisiana.

APPENDIX A.

SUPREME COURT OF LOUISIANA.

MONDAY, FEB. 10, 1958.

No. 43,014.

BROWN-FORMAN DISTILLERS CORPORATION,

versus

COLLECTOR OF REVENUE.

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT IN AND FOR THE PARISH OF EAST BATON ROUGE—HONORABLE COLEMAN LINDSEY, JUDGE.

McCALEB, Justice.

Simon, J., Absent:

Availing itself of the remedy provided by R.S. 47:1576, appellant, a foreign corporation organized and existing under the laws of the State of Kentucky, brought this suit against the Collector of Revenue to recover State income taxes and interest amounting to $6975 paid under protest for the fiscal years ending April 30th, 1951, 1952 and 1953 respectively, which admittedly would be due by appellant, if its activities in Louisiana were such as to subject it to the Louisiana income tax.

The salient allegations of the petition are that appellant is engaged solely in interstate commerce, its busi-

ness consisting of the distillation and packaging of whiskies at Louisville, Kentucky and the distribution thereof among the several states of the Union; that it ships its goods to customers in Louisiana upon orders submitted by the latter to its representatives in Louisiana who transmit said orders to Louisville where they are considered and approved or rejected; that, in the event of approval of the orders, the merchandise is shipped directly to the customer who remits payment to it at Louisville; that it does not maintain a warehouse or stock of goods in Louisiana, its activities being limited to the presence of "missionary men" who call upon wholesale dealers and who, on occasion, accompany the salesmen of these wholesalers to assist them in obtaining a suitable display of appellant's merchandise at the business etablishments of said retailers and that said "missionary men" neither solicit nor accept orders from the retail dealers. It is concluded that, in view of its activities, the levying of an income tax upon appellant is contrary to the Constitution of the United States and particularly the commerce clause thereof.

The petition was filed on October 1, 1954 and no further action was taken in the proceeding until October 3, 1955, when a supplemental petition was filed for recovery of additional income taxes paid under protest amounting to $11,754.76. Thereafter, the matter remained dormant until April 17, 1956, at which time the Collector of Revenue appeared and interposed an exception of no cause or right of action. This pleading is predicated on the contention that appellant's averments relative to the interstate nature of its business does not

immunize it from a tax on its net income derived from sources within this State and, further, that the facts it alleges respecting its operations fail to show that it did not owe the tax in question.

After a hearing, the exception was sustained by the trial judge and the suit dismissed. Hence this appeal.

In this Court, appellant claims that the judge erred in holding that it has derived income from sources within Louisiana for which it is subject to taxation by Louisiana and in failing to hold that the imposition of the income taxes unconstitutionally burdens interstate commerce and deprives it of due process in violation of the Fourteenth Amendment to the United States Constitution.

During oral argument of the case, we gathered the impression that the basis for the trial judge's ruling on the exception was that the allegations of appellant's petition were insufficient to set forth a cause of action. However, we find that we were in error as an examination of the petition and the briefs filed by opposing counsel make it clear that appellant has alleged all facts pertinent to its case and the judge was evidently of the view, although he did not assign written reasons, that those facts, admitted to be true for the purpose of the exception, disclosed that appellant has no cause of action.

The long delay in bringing this cause to issue is undoubtedly attributable to the pendency in this Court during 1955 of the case of *Fontenot vs. John I. Hay Com-*

pany, 228 La. 1031, 84 So. (2d) 810, which presented a very similar question with respect to the right of the State to levy a net income tax on a foreign corporation engaged exclusively in interstate commerce. In that matter (the opinion was handed down on December 12, 1955 and a rehearing denied on January 16, 1956), it was resolved that the circumstance that a foreign corporation is engaged exclusively in an interstate business does not exempt it from the payment of State taxes assessed on the net income derived by it from sources within the State.[1]

The opinion in the *Hay* case fully answers appellant's argument that the levy of a tax by Louisiana on the net income derived by it from sources within this State unduly burdens interstate commerce and is, therefore, unconstitutional. That decision is founded upon pronouncements of the Supreme Court of the United States, particularly *United States Glue Co. vs. Oak Creek*, 247 U.S.

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[1] R.S. 47:31(4) provides: "Foreign corporations shall be taxed on net income from sources within the State as hereinafter set out".
R.S. 47:241 reads "The net income of a nonresident individual or foreign corporation subject to the tax imposed by this Chapter shall be the sum of the net allocable income earned within or derived from sources within this state, as defined in R.S. 47:243, and the net apportionable income derived from sources in this state, as defined in R.S. 47:244, * * *".
R.S. 47:244 declares, in part, "The net apportionable income derived from sources in this state shall be computed by multiplying the total net apportionable income by the Louisiana apportionment per cent determined in accordance with the provisions of R.S. 47:245."
R.S. 47:245F and R.S. 47:246 provide the method of determination of apportionment percentage and the attribution of the gross sales within and without the state which forms the basis by which the tax or net income from sources within the state is fixed.

321, 62 L. Ed. 1135, 38 S. Ct. 499, Ann. Cas. 1918 E., 748; *Interstate Buses Corp. vs. Blodgett*, 276 U.S. 245, 72 L. Ed. 551, 48 S. Ct. 230; *Memphis Natural Gas Co. vs. Beeler*, 315 U.S. 649, 656, 86 L. Ed. 1090, 1096, 62 S. Ct. 857 and *West Pub. Co. vs. McColgan*, 328 U.S. 823, 90 L. Ed. 1603, affirming by per curiam the holding of the Supreme Court of California that a foreign corporation, doing business exclusively in interstate commerce, was amenable to state taxes on net income attributable to sources within the State, wherein that court (see 27 Cal. 2d. 705, 166 F. 2d. 861, 863) aptly observed:

> "It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause."

In its brief, appellant does not directly assail the ruling in the *Hay* case but seeks to distinguish it from the instant matter on the ground that, there, the taxpayer performed extensive services in Louisiana, maintaining an office and staff of employees in this State and using waterways for the operation of its craft.

But the circumstance that the operations of the Hay Company in Louisiana might be of greater magnitude than those of appellant furnishes no predicate for differentiation as the extent of the activity of the taxpayer within the State is of no importance in determining whether the levy is a burden on interstate commerce. On the contrary, appellant's argument respecting its lack of activity within Louisiana addresses itself more proper-

ly to its belated contention (it is not specially pleaded) that the tax herein levied deprives it of due process.

In support of its contention that the tax unconstitutionally burdens its interstate operations, appellant cites several cases involving privilege and use taxes and the recent decision of the Supreme Court of Georgia in *Stockham Valves & Fittings, Inc. vs. Williams* (unreported, handed down November 8, 1957). The cases involving privilege and use taxes are not apposite because of the very nature of the taxes and the Georgia case, being directly contrary to the *Hays* case, is, of course, not persuasive.

Nor do we find substance in appellant's contention that it does not derive income from sources within Louisiana. This point is predicated on appellant's conclusion that its salesmen in Louisiana, to whom the petition gives the appellation "missionary men", are not really salesmen because they merely take orders from local wholesale liquor dealers for the purchase of appellant's whiskies, the orders being accepted or rejected in Louisville, Kentucky thus constituting an interstate transaction. From this premise, it is professed, without force in our opinion, that the purchase of its goods by Louisiana wholesalers does not provide it with a source of income from Louisiana.

Although appellant has not specially pleaded that the imposition of an income tax upon it violates due process, we nonetheless give consideration to this claim in view

of the general charge that the levy is forbidden by the United States Constitution.

Suffice it to say that the claim of violation of the Fourteenth Amendment has no merit. See *International Shoe Co. vs. Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 and *West Publishing Co. vs. McColgan, supra.*

The judgment is affirmed.

APPENDIX B.

19TH JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA.

No. 51,073.

BROWN-FORMAN DISTILLERS CORPORATION,

versus

COLLECTOR OF REVENUE.

JUDGMENT.

This cause came regularly for hearing on the exception of no cause and no right of action filed by the defendant herein on the twenty-third day of April, 1956, and the Court considering the law and the evidence to be in favor of exception,

IT IS ORDERED, Adjudged And Decreed that the exception of no cause and no right of action be and it is hereby sustained and the plaintiff's suit dismissed at his costs.

Judgment rendered in open Court the twenty-third day of April, 1956.

Judgment read and signed in open Court this 3rd day of May, 1956.

(S.) COLEMAN LINDSEY,
Judge.

Filed May 3, 1956.
(Signed) GLADYS C. HEARNE,
Dy. Clerk.

APPENDIX C.

Louisiana Statutes Involved.

La R.S. 47:241:

"The net income of a nonresident individual or foreign corporation subject to the tax imposed by this Chapter shall be the sum of the *net allocable income earned within or derived from sources within this state*, as defined in R.S. 47:243, *and* the *net apportionable income derived from sources in this state*, as defined in R.S. 47:244, less the amount of federal income taxes attributable to the net allocable income and net apportionable income derived from sources in this state. * * *"

La. R.S. 47:244:

"* * *

"The net apportionable income derived from sources in this state shall be computed by multiplying the total net apportionable income by the Louisiana apportionment per cent determined in accordance with the provisions of R.S. 47:245.

* * *"

La. R.S. 47:246 B:

"Sales secured through efforts of sales organization of the taxpayer. Sales which are made by the taxpayer upon orders secured through the efforts of salesman or sales agents of the taxpayer including all sales not covered by Sub-section A of this Section, shall be attributed within or without or partly within and partly without this state by means of a formula giving weight to the various factors associated with such sales, as follows:

"(1) Securing the order. Fifty per centum (50%) of such sales shall be attributed to the state in which is located the office or other place of business to which is attached the salesman or agent who secured the order. However, if the customer is located in another state, and the salesman solicited the order there, then one-half of the fifty per centum (50%) shall be attributed to such other state. Fifty per centum (50%) of sales made upon orders secured by mail shall be attributed to the state in which is located the place at which the order is received by the taxpayer or an officer, agent, or employee of the taxpayer.

"(2) Filling the order. Twenty-five per centum (25%) of such sales shall be attributed to the state in which is located the place from which the taxpayer ships the merchandise or products to the purchaser.

"(3) Location of purchaser. Twenty-five per centum (25%) of such sales shall be attributed to the state in which is located the place at which the purchaser receives the merchandise or products."

La. R.S. 47:245:

"F. Manufacturing, merchandising and other business. The Louisiana apportionment per cent of any taxpayer whose net apportionable income is derived primarily from a business or manufacturing or merchandising or from any other business not included in Sub-sections A through E, shall be the arithmetical average of three ratios, as follows:

"(1) The ratio of the value of the immovable and corporeal movable property owned by the taxpayer and located in Louisiana, to the value of all immovable and corporeal movable property owned by the taxpayer and used in the production of the net apportionable income.

"(2) The ratio of the amount paid by the taxpayer for salaries, wages, and other compensation for personal services rendered in this state, to the total amount paid by the taxpayer for salaries, wages, and other compensation for personal services in connection with the production of net apportionable income; and

"(3) The ratio of net sales made in the regular course of business and other gross apportionable income attributable to this state to the total net sales made in the regular course of business and other gross apportionable income of the taxpayer.

"For the purpose of this Sub-section sales attributable to this state shall be all sales where the goods, merchandise or property is received in this state by purchaser. In the case of delivery of goods by common carrier or by other means of transportation, including transportation by the purchaser, the place at which the goods are ultimately received after all transportation has been completed shall be considered as the place at which the goods are received by the purchaser. However, direct delivery into this state by the taxpayer to a person or firm designated by a purchaser from within or without the state shall constitute delivery to the purchaser in this state."

La. R.S. 47:31(4):

"Foreign corporations. Foreign corporations shall be taxed on net income from sources within the state, as hereinafter set out."

La. R.S. 1576:

"A right of action is hereby created to afford a remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for the recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

"This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Subtitle, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In

such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

"This Section shall be construed to provide a legal remedy in the state or federal courts, by action at law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

"Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided."

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No. 142

In the Supreme Court of the United States

OCTOBER TERM, 1958

BROWN-FORMAN DISTILLERS CORPORATION,
APPELLANT

v.

COLLECTOR OF REVENUE,
APPELLEE

On Appeal from the Supreme Court of the State of Louisiana

Motion to Dismiss on Behalf of the Collector of Revenue

ROBERT L. ROLAND
Room 403
Capitol Annex
Baton Rouge, Louisiana
Attorney for Appellee

Of Counsel:
LEVI A. HIMES
ROY M. LILLY, JR.
PHILIP N. PECQUET
CHAPMAN L. SANFORD
Attorneys,
Louisiana Department of Revenue

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OCTOBER TERM, 1958

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v.

COLLECTOR OF REVENUE,
APPELLEE

On Appeal from the Supreme Court of the State of Louisiana

Motion to Dismiss on Behalf of the Collector of Revenue

Appellee, through undersigned counsel of record, respectfully moves that this appeal be dismissed on the following grounds:

I.

This appeal presents no case or controversy within the meaning of Section 2 of Article III of the Constitution of the United States in that appellant waived its right to appeal and subsequent thereto the taxes for which recovery is sought were transferred from the segregated fund established by law into the

treasury of the state for expenditure, thus making the cause moot; there is accordingly no subject matter upon which the judgment of this Court can operate.

II.

This appeal is in effect, by virtue of appellant's action in acquiesing in the judgment of the court below, a suit against the state to which the state has not given its consent and this Court is therefore without jurisdiction to hear the appeal.

STATEMENT

This is an appeal from a final judgment and decree of the Supreme Court of Louisiana.

Appellant paid certain *net income* taxes under protest and instituted suit for recovery thereof, all pursuant to Section 1576 of the Louisiana Revised Statutes of 1950, set out in full in Appendix II of this motion.

The petition alleged very few facts and concluded that the levying of a net income tax upon petitioner was contrary to the Constitution of the United States, and particularly the commerce clause thereof. (District Court petition, Articles 4 through 7, inclusive). The Collector filed exceptions of no cause and no right of action (demurrer), which were sustained by the District Court. Appellant timely appealed and the Louisiana Supreme Court affirmed the decision of the Court below.

The case has never been heard on its merits, and the only facts involved are the facts alleged in the

petition, which for the purposes of the exception only, were considered to be true.

As will appear from Appendix I of this motion, appellant advised after the Louisiana Supreme Court denied its application for a rehearing, that writs would not be applied for, and the moneys involved were subsequently transferred from an escrow account into the State Treasury with the full knowledge of and without objection by appellant.

More than one month later, appellant filed this appeal.

ARGUMENT

I.

Under the facts of this case, there is no subject matter upon which the judgment of this Court can operate, and any opinion rendered herein would of necessity be advisory only.

Although appellee has divided this argument in favor of the motion to dismiss into two parts, both are based upon one very simple fact.

After the Louisiana Supreme Court denied a rehearing, appellant advised that writs would not be applied for, thereby indicating that this particular litigation had been concluded. Thereafter, appellee advised that the funds involved were being removed from escrow and this removal was subsequently completed without objection from appellant.

It is submitted that appellant's action in advising appellee that writs would not be applied for was tanta-

mount to a waiver of its right of appeal. Accordingly, the appeal should be dismissed upon the authority of the following statement in the case of *Mills v. Green*, 159 U. S. 651, 652, 16 S. Ct. 132, 40 L. Ed. 293:

> "The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. And such a fact, when not appearing on the record, may be proved by extrinsic evidence. *Lord v. Veazie*, 8 How. 251; *California v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876."

Certainly, a stronger case for dismissal exists here because the 'event rendering it impossible for the Court to grant effectual relief' was brought about by appellant itself—not an outside factor over which it had no control.

As appellant cannot now recover the taxes paid under protest since they were paid into the Treasury in reliance upon appellant's written statement that no appeal would be taken, it is also submitted that any opinion rendered herein would be advisory only. This would do violence to the fixed principle of constitu-

tional law that the Supreme Court will not render advisory opinions.

As recently as 1951, in the case of *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees of America, Division 998, et al. v. Wisconsin Employment Relations Board*, 340 U. S. 416, 418, 71 S. Ct. 373, this Court reiterated that principle saying:

> "It is argued that the Wisconsin courts have adopted a practice of deciding questions of importance even though the case has become moot, and we are urged to follow that same practice. But whatever the practice in Wisconsin courts, 'A federal court is without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it. *United States v. Alaska S. S. Co.*, 253 U. S. 113, 115, 116, 40 S. Ct. 448 [449], 64 L. Ed. 808, and cases cited; *United States v. Hamburg-Amerikanische Packet-Fahrt-Actien Gesellschaft*, 239 U. S. 466, 475-477, 36 S. Ct. 212, 216, 60 L. Ed. 387.' *St. Pierre v. United States*, 1943, 319 U. S. 41, 42, 63 S. Ct. 910, 911, 87 L. Ed. 1199."

II.

In light of the events transpiring between the final decision below and this appeal, the case is no longer a suit for recovery of taxes, but is instead an unauthorized suit against the state, and this Court is therefore without jurisdiction.

It should also be noted that the judgment was executed when appellee transferred the funds from the

escrow account after receipt of appellant's advice that writs would not be applied for.

Had this action taken place between the lower court decision and the appeal to the Louisiana Supreme Court, appellant would have been governed by the provisions of Article 567 of the Louisiana Code of Practice, the pertinent part of which reads as follows:

" * * *

"The party against whom judgment has been rendered can not appeal:

"1. If such judgment have been confessed by him, *or if he have acquiesced in the same, by executing it voluntarily.*

" * * *."

(Emphasis supplied).

The facts of this case, it is submitted, would have required a conclusion that the appellant had lost its right to appeal.

While this provision relates to Louisiana procedure, as opposed to federal procedure, it lends support to our contention that the case was concluded when the moneys were transferred. This being so, the allowance of this appeal would be tantamount to allowing appellant to bring suit against the state in the Supreme Court of the United States—a suit seeking a declaratory judgment concerning possible liabilities for future taxes.

Such an action could not be brought directly since it is not one over which this Court has original juris-

diction. Similarly, the Eleventh Amendment to the United States Constitution expressly prohibits federal courts from exercising jurisdiction in suits between a state and its citizens. Certainly, appellant should not be allowed to do indirectly what it is expressly prohibited from doing directly.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the appeal should be dismissed.

Robert L. Roland
Counsel for Appellee

July , 1958.

Appendix I

Additional Statement of Facts

Appendix II

Louisiana Statutes Involved

PROOF OF SERVICE

I, Robert L. Roland, attorney of record for appellee in this matter and a member of the bar of this Court, do certify that a copy of this brief was served upon appellant by depositing same this ..... day of July, 1958, in a United States post office, first-class postage prepaid, addressed to the Honorable Harry McCall, attorney of record for appellant, at 1500 National Bank of Commerce Building, New Orleans 12, Louisiana.

Robert L. Roland

APPENDIX I

Additional Statement of Facts

These facts developed after the rehearing was denied by the Louisiana Supreme Court on March 17, 1958, and are therefore not in the record.

1. Mr. Burke, attorney for appellant, wrote Mr. Roland, attorney for appellee on March 20, 1958, saying, "I have checked with Brown-Forman and want to let you know that we will not apply for writs."

2. Mr. Roland replied to that letter on March 24, 1958, thanking Mr. Burke for his letter and advising, "We are transferring the payments from escrow into current collections."

3. Mr. Roland advised the income tax division on May 1, that the Brown-Forman litigation had been terminated and requested that the division take appropriate action to transfer the funds from escrow into current collections.

4. On May 14, 1958, Mr. Ward, Chief of the Income Tax Division, authorized Mr. Frederic, Chief of the Cashiers Division, to transfer the $34,045.06 involved from escrow into current collections.

5. On May 16, 1958, the transfer was accomplished by escrow transfer No. 440, check No. 3363.

APPENDIX II

Louisiana Statutes

§ 1576. Payment of tax under protest; remedy at law for recovery

A right of action is hereby created to afford a

remedy at law for any person aggrieved by the prohibition of courts restraining the collection of tax, penalty, interest or other charges imposed in this Sub-title. The person resisting the payment of any amount found due by the collector, or of enforcement of any provisions of this Sub-title, shall pay the amount found due to the collector and at that time shall give the collector notice of his intention to file suit for recovery thereof. Upon receipt of this notice, the amount paid shall be segregated and held by the collector or his duly authorized representatives for a period of thirty days. If suit is filed within the thirty-day period for the recovery of such amount, the funds segregated shall be further held pending the outcome of the suit. If the person prevails, the collector shall refund the amount to the claimant, with interest at the rate of 2% per annum covering the period from the date said funds were received by the collector to the date of refund.

This Section shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter, for a full and complete adjudication of any and all questions arising in the enforcement of this Sub-title, as to the legality of any tax accrued or accruing or the method of enforcement thereof. In such action, service of process upon the collector shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

This Section shall be construed to provide a legal remedy in the state or federal courts, by action at

law, in case such taxes are claimed to be an unlawful burden upon interstate commerce, or the collection thereof, in violation of any Act of Congress or the United States Constitution, or the Constitution of the State of Louisiana, or in any case where jurisdiction is vested in any of the courts of the United States.

Upon request of a person and proper showing by such person that the principle of law involved in an additional assessment is already pending before the courts for judicial determination, such person, upon agreement to abide by the decision of the courts, may pay the additional assessment under protest, but need not file an additional suit. In such cases the tax so paid under protest shall be segregated and held by the collector until the question of law involved has been determined by the courts and shall then be disposed of as therein provided.

Louisiana Code of Practice

Article 567. Judgment debtor—When barred from appealing:—The party against whom judgment has been rendered can not appeal:

1. If such judgment have been confessed by him, or if he have acquiesced in the same, by executing it voluntarily.

2. If he has suffered the time prescribed by law for appealing to elapse.